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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

IN THE MATTER OF:	)	U.S. EPA Docket No. RCRA-09-2006-00018
ALL METALS PROCESSING COMPANY	)	
EPA ID No. CAD 008297996	)	INITIAL DECISION: PENALTY DETERMINATION

INTRODUCTION

This proceeding is governed the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination, or Suspension of Permits (Consolidated Rules). Section 22.17 (c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), provides that when a respondent is found to be in default, "The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." When reaching a penalty determination, Section 22.27(b) of the Consolidated Rules states that the Presiding Officer shall consider any evidence in the record and any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail how the assessed penalty corresponds to any penalty criteria set forth in the Act. Section 22.27(b) of the Consolidated Rules prohibits the Presiding Officer from assessing a penalty greater than that proposed in the complaint, the prehearing information exchange or the motion for default, whichever is less.

PROCEDURAL HISTORY

On September 29, 2006, the United States Environmental Protection Agency (Complainant) filed a Determination of Violation, Compliance Order and Notice of Right to Request a Hearing against All Metals Processing Company and The Helen L. Powers Revocable Trust. Complainant subsequently moved the Presiding Officer to withdraw the Complaint against The Helen T. Powers Revocable Trust. On September 19, 2007, the Presiding Officer issued an Order granting Complainant's motion to withdraw the Complaint against The Helen T. Powers Revocable Trust. However, the Complaint remained in effect against All Metals Processing Company ("Respondent"). Pursuant to 40 C.F.R. § 22.15(a), Respondent was required to file an Answer to the Complaint within thirty (30) days after service of the Complaint. Respondent failed to file an answer to the Complaint. On February 26, 2007, Complainant filed a Motion for Default pursuant to 40 C.F.R. § 22.17, seeking an entry of default judgment while reserving the right to seek a future judgment addressing an appropriate penalty. Respondent did not file an opposition to Complainant's Motion for Default. On May 18, 2007, the Presiding Officer issued an Order on the Motion for Default holding Respondent liable for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, *et seq.*

Pursuant to 40 C.F.R. § 22.19(a)(4), Complainant is required to propose a specific penalty within fifteen (15) calendar days after Respondent files its prehearing exchange. However, Complainant never proposed a specific penalty because Respondent never filed an answer or a prehearing exchange. Nonetheless, Complainant contained information regarding the number and severity of the violations in the Complaint in accordance with 40 C.F.R. § 22.14(a)(4)(ii). Complainant now seeks to have the Presiding Officer issue a penalty

determination against Respondent for the RCRA violations set forth in the Complaint.

PENALTY ASSESSMENT

The Complaint lists six RCRA violations. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), as amended by the Debt Collections Improvement Act of 1996, 40 C.F.R. Part 19, authorizes a civil penalty up to THIRTY-TWO THOUSAND FIVE HUNDRED DOLLARS ($32,500.00) per day for each violation of Subtitle C of RCRA, 42 U.S.C. § 6921 *et seq.*, that occurs after March 15, 2004. *See* 69 Fed. Reg. 7121 (February 13, 2004). Complainant requests that the Presiding Officer assess a civil penalty against Respondent of up to $32,500 per day, for each day a cited violation continued, because all the cited violations occurred after March 15, 2004.

The penalty calculations system established through EPA's RCRA Civil Penalty Policy ("Penalty Policy") is based upon Section 3008 of RCRA, 42 U.S.C. § 6928. Under this section, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. The Penalty Policy consists of: (1) determining a gravity-based penalty for a particular violation from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance. The Environmental Appeals Board has emphasized that the agency's penalty policies should be applied whenever possible because such policies "assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *M.A. Bruder & Sons, Inc.,* 10 E.A.D. 598, 613 (EAB 2002).

Count I – Failure to Minimize a Release of a Hazardous Waste

The Presiding Officer previously found Respondent liable for violations of 22 C.C.R. § 66262.34 (a)(4). In its moving papers, Complainant seeks a combined penalty for Count I in the amount of $721,697.00. I find Complainant's penalty request consistent with the record, RCRA, and the Agency's Penalty Policy for the following reasons:

1) Potential for Harm: On September 28, 2004, Complainant discovered that hazardous waste, in the form of chromium and other metals used at Respondent's metal plating plant, were seeping through the facility's exterior on to the ground along a storm water canal. Complainant's inspectors noted that the seepage ran approximately 20 feet along the facility's exterior wall and began at a uniform level on the wall, approximately 4 ½ feet above ground level. The seepage evidence corresponded to the location of a secondary containment level located directly beneath the facility's floor. Complainant's inspectors also identified yellow and red staining on the exterior wall an in the soils adjacent to the wall. Complainant's analysis of the stained soils revealed the presence of chromium and other metals used in Respondent's metal plating operations. The release of metal plating fluids through the building's exterior and into nearby soils posed both a risk of exposure to humans who may come into contact with the soil and to environmental receptors because of contaminated soil's close proximity to a drainage channel that ultimately empties into the Los Angeles River and Pacific Ocean. Although Complainant did not provide evidence of the drainage channel's proximity to the seepage, I still agree with Complainant's assessment that Respondent's RCRA violations created a "Major Potential for Harm" due to the existance of the seepage outside of the building.

2) Extent of Deviation: The Penalty Policy defines a Major Extent of Deviation as a situation wherein "[t]he violator deviates from the requirements of the regulations or statute to

such extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." *See* Penalty Policy at 17. Respondent inaction constitutes a Major Deviation from the requirements of 22 C.F.R. § 66265.31 because Respondent allowed the release of metal plating fluids to continue for at least 730 days without making any attempt to minimize the release.

The Penalty Policy provides that EPA enforcement personnel have the discretion to select the exact amount within a particular cell of the gravity penalty matrix so they may adapt the penalty amount to the gravity of the violation and its surrounding circumstances. *See* Penalty Policy at 19. Enforcement personnel should analyze and rely on case-specific factors in selecting a dollar figure from this range. Such factors include the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator, the number of days of violation, and other relevant matters. In the instant case, Respondent operated a small, relatively unsophisticated business. Therefore, I agree with the Complainant's selection of the gravity-based penalty of $29, 146.00 for one day from the middle of the Major Harm/Major Deviation cell of the gravity matrix.

3) Multi-Day Penalty Calculation: Under the Penalty Policy, multi-day penalties are mandatory for Major Harm/Major Deviation violations. *See* Penalty Policy at 25. 730 days of continuous violations occurred between September 28, 2004 and September 28, 2006. In turn, Complainant determined that multi-day penalties are appropriate due to the seriousness of the release into the soil and possibly to surface water and groundwater. Since multi-day penalties

are ordinarily assessed for days 2-180, it is appropriate for Complainant to multiply the daily penalty amount of $3,869.00 by the multi-day factor of 179, which results in a total multi-day penalty of $692,551.00. The total of the gravity penalty, $29,146.00, plus the multi-day penalty, $692,551.00, results in a combined penalty for Count I of $721,697.00.

Count II – Failure to Label Containers

22 C.C.R. §§ 66262.34(a)(2), 66262.34(e)(1)(C), and 66262.34(f)(3) [*See* 40 C.F.R. § 262.34(c)(1)(ii)] require the owner or operator of a facility that stores hazardous waste on-site without a permit or grant of interim status to label each container with the initial date upon which each period of accumulation begins. 22 C.C.R. § 66262.34(f)(3) [*See* 40 C.F.R. § 262.34(c)(1)(ii)] requires containers containing accumulated wastes to be labeled with the words, "Hazardous Waste" as well as the composition and physical state of the wastes, a statement calling attention to the particular hazardous properties of the wastes, and the name and address of the person producing the waste. On September 28, 2004, Respondent incurred a one-day violation of 22 C.C.R. §§ 66262.34(e)(1)(C), and 66262.34(f) [*See* 40 C.F.R. §§ 262.34(a)(2) and 262.34(c)(1)(ii)] when it failed to properly label onsite containers of accumulated hazardous waste. This violation subjects Respondent to a penalty determination.

I find Complainant's penalty request of $12, 250.00 consistent with RCRA and the Agency's Penalty Policy for the following reasons:

1) Potential for Harm: I agree with Complainant's assessment of Respondent's failure to properly label the aforementioned containers as a Moderate Potential for Harm because Respondent's failure to label the hazardous waste posed a significant risk of exposure to humans and to the environmental receptors who came in contact with the unlabeled contents of the containers and super-sack at Respondent's facility.

2) Extent of Deviation: The Penalty Policy defines a Major Extent of Deviation as a situation wherein "[t]he violator deviates from the requirements of the regulations or statute to such extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." *See* Penalty Policy at 17. The failure to provide any kind of label on the super-sack and on other containers of hazardous waste is a major deviation from the requirements of the regulations.

3) Multi-Day Penalty Calculation: EPA enforcement personnel should consider all relevant factors, including the seriousness of the violation relative to other violations falling within the same matrix cell, and the size and sophistication of the Respondent. Complainant selected the middle of the gravity-based matrix for this violation because Respondent operated a small and relatively unsophisticated business. Complainant's selection of the $12, 250.00 gravity-based penalty from the middle of the Moderate Harm/Major Deviation cell of the gravity matrix for the one-day violation is consistent with RCRA and the Agency's Penalty Policy.

Count III – Failure to Close Containers

22 C.C.R. §§ 66262.34(a)(1)(A), 66262.34(e)(1)(D) [*See* 40 C.F.R. § 262.34(a)(1)] require a generator who accumulates wastes on-site without a permit or interim status to comply with container closure requirements found at 22 C.C.R. § 66265.173(a) of Article 9 of Chapter 15 of California's Environmental Health Standards for the Management of Hazardous Wastes. 22 C.C.R. § 66265.173(a) [*See* 40 C.F.R. § 265.173(a)] requires that a container holding hazardous waste must be closed during storage except when it is necessary to add or remove waste.

Respondent violated 22 C.C.R. § 66265.173(a) [*See* 40 C.F.R. § 265.173(a)] for one day,

on September 28, 2004, when it failed to close 55 gallon and 30 gallon containers of hazardous wastes, and two 55 gallon containers of waste labeled oxide salts (F006). Respondent also failed to close a 5-gallon container of hazardous waste filter cake located near wastewater tanks. At the time of the inspection, Respondent was not adding waste to or removing waste from the open containers.

1) Potential for Harm: I agree with Complainant's characterization of Respondent's failure to close containers as a Moderate Risk for Potential Harm because the violation posed a significant risk of exposure to humans and other environmental receptors to hazardous waste.

2) Extent of Deviation: The Penalty Policy defines a Major Extent of Deviation as a situation wherein "[t]he violator deviates from the requirements of the regulations or statute to such extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." *See* Penalty Policy at 17. I agree with Complainant's assessment that Respondent's failure to close the hazardous waste containers constituted a Major Deviation from the regulation's requirements.

3) Multi-Day Penalty Calculation: EPA enforcement personnel should consider all relevant factors, including the seriousness of the violation relative to other violations falling within the same matrix cell, and the size and sophistication of the Respondent. Complainant selected the middle of the gravity-based matrix for this violation because Respondent operated a small and relatively unsophisticated business. Complainant's selection of the $12, 250.00 gravity-based penalty from the middle of the Moderate Harm/Major Deviation cell of the gravity matrix for the one-day violation is consistent with RCRA and the Agency's Penalty Policy.

Count IV – Failure to Place Hazardous Waste in a Container

22 C.C.R. §§ 66262.34(a)(1)(A) [*See* 40 C.F.R. § 262.34(a)(1)(I)] states that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or having interim status provided that the hazardous waste is placed in containers as the generator complies the requirements of Article 9 of Chapter 15 of California's Environmental Health Standards for the Management of Hazardous Waste. 22 C.C.R. §§ 66265.171 of Article 9 [*See* 40 C.F.R. § 265.171] Respondent was found to be in violation of the regulations for one day, September 28, 2004, because Respondent failed to place a container under a filter press to prevent the hazardous waste filter cake from accumulating on the floor. 22 C.C.R. §§ 66265.171 of Article 9 [*See* 40 C.F.R. § 265.171]

1) Potential for Harm: I agree with Complainant's assessment that the failure to prevent filter cake from accumulating on the floor posed a Moderate Potential for Harm because the situation created a significant risk of exposure of hazardous waste to facility workers.

2) Extent of Deviation: The Penalty Policy defines a Major Extent of Deviation as a situation wherein "[t]he violator deviates from the requirements of the regulations or statute to such extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." *See* Penalty Policy at 17. I also agree with Complainant's assessment that the accumulation of filter cake amounted to a Moderate Deviation because Respondent eventually transferred the filter cake to containers prior to disposal.

3) Multi-Day Penalty Calculation: EPA enforcement personnel should consider all relevant factors, including the seriousness of the violation relative to other violations

falling within the same matrix cell, and the size and sophistication of the Respondent. Complainant selected the middle of the gravity-based matrix for this violation because Respondent operated a small and relatively unsophisticated business. Based on the overall situation, I agree the Complainant's assessment. In turn, the $8,381.00 gravity based penalty, which Complainant selected from the middle of the Moderate Harm/Moderate Deviation cell, is consistent with the record, RCRA, and the Agency's Penalty Policy.

Count V – Failure to Maintain Emergency Equipment

22 C.C.R. § 66262.34(a)(4) [*See* 40 C.F.R. § 262.34(a)(4)] requires generators who accumulate hazardous waste onsite without a permit or interim status to comply with the requirements for owners and operators in Article 3 and 4 of Chapter 15 of California's Environmental Health Standards for the Management of Hazardous Wastes. 22 C.C.R. § 66262.33 of Article 3 [*See* 40 C.F.R. § 265.33] requires that all facility decontamination equipment, where required, be tested an maintained as necessary to assure its proper operation in time of an emergency.

On September 28, 2004, Complainant's inspector discovered that Respondent failed to maintain an accessible shower and eyewash unit in the Black Oxide Plating Area. A large container blocked access to the shower and the eyewash unit.

1) Potential for Harm: I agree with Complainant's characterization of Respondent's failure to maintain an accessible shower and eyewash unit as a Minor Risk for Potential Harm because the eyewash unit and shower were functioning, but were blocked from being accessible.

2) Extent of Deviation: The Penalty Policy defines a Major Extent of Deviation as a

situation wherein "[t]he violator deviates from the requirements of the regulations or statute to such extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." *See* Penalty Policy at 17. I agree with Complainant's assessment that Respondent's failure to maintain an accessible shower and eyewash unit constituted a Major Deviation from the regulation's requirements because the equipment was functioning, but was blocked from being accessible..

3) Multi-Day Penalty Calculation: EPA enforcement personnel should consider all relevant factors, including the seriousness of the violation relative to other violations falling within the same matrix cell, and the size and sophistication of the Respondent. Complainant selected the middle of the gravity-based matrix for this violation because Respondent operated a small and relatively unsophisticated business. Complainant's selection of the $386.00 gravity-based penalty from the Minor Harm/Minor Deviation cell of the gravity matrix for the one-day violation is consistent with RCRA and the Agency's Penalty Policy.

Count VI – Storage of a Hazardous Waste Without a Permit or Interim Status

Complainant also cited Respondent with multiple violations of 22 C.C.R. § 66270.1(c) [40 C.F.R. § 270.1(c)], which requires a permit for the "treatment," "storage," and "disposal" of any "hazardous waste. Although Complainant recognizes that 22 C.C.R. § 66262.34(a)(4) allows generators of hazardous waste to accumulate hazardous waste on-site without a permit or interim status if generators comply with the requirements for owners and operators in Articles 3 & 4 of Chapter 15 of California's Environmental health Standards for the Management of Hazardous Wastes, Complainant argues that Respondent violated 22 C.C.R. § 66270.1(c) [40

C.F.R. § 270.1(c)] multiple times because Respondent neither obtained proper permits or interim status, nor complied with the requirements of Articles 3 & 4 of Chapter 15 of California's Environmental health Standards for the Management of Hazardous Wastes. Nonetheless, Complainant is not seeking any separate damages pursuant to Count VI of the Complaint because the first five counts of the Complaint seek a sufficient penalty. 40 C.F.R. § 22.27(b) states, "If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that posed by complainant in the complaint, the prehearing information exchange, or in the motion for default, whichever is less." Since Respondent has defaulted and Complainant does not seek any damages pursuant to Count VI, no damages will be assessed under Count VI.

CONCLUSION

After considering the criteria for penalty modifications under the Penalty Policy, *see* Penalty Policy 38-40, I conclude that a reduction of Complainant's proposed penalty is not justified because Respondent has not offered any evidence that it made any effort to comply with the RCRA hazardous waste regulations. Similarly, the record shows a degree of willfulness and/or negligence on behalf of Respondent. Lastly, the duration of the violation establishes a substantial history of non-compliance with the RCRA hazardous waste regulations. In turn, I assess a penalty in the amount of $754,964.00 against Respondent All Metals Processing Company.

ORDER

RESPONDENT IS HEREBY ORDERED TO pay a civil penalty in the amount of Seven Hundred and Fifty-Four Thousand and Nine Hundred and Sixty-Four Dollars **($754,964.00)**. This penalty shall become due and payable, without further proceedings, **thirty (30) days** after this order becomes final. This Order shall become final within **forty-five (45) days** after its service upon the parties and without further proceedings, unless (1) a party appeals the Initial Decision to the Environmental Appeals Board, (2) a party moves to set aside the order, or (3) the Environmental Appeals Board elects to review this initial Decision on its own initiative. *See* 40 C.F.R. § 22.27(c). Procedures for appealing this Initial Decision are listed in the Consolidated Rules at 40 C.F.R. § 22.30.

Payment shall be made by forwarding a money order, cashier's check, or certified check, in the amount of $754,964.00 payable to Treasurer of the United States of America to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

All payments shall indicate the name of the facility, any EPA identification number of the facility, Respondent's name and address, and the EPA docket number for this action. At the time payment is made, Respondent shall send a copy of the payment transmittal to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region IX, ORC
75 Hawthorne Street
San Francisco, CA 94105

If the civil penalty is not paid within the prescribed time period, interest will be assessed

pursuant to Section 11 of the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3717, based on the present value of funds owed to the United States Treasury at the time the Initial Order becomes final, and such rate will remain in effect until full payment is received. A six percent (6%) per annum late payment penalty will also be applied on any principle amount not paid within ninety (90) days of the due date.

Date: November 14, 2008

Steven L. Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing **INITIAL DECISION: PENALTY DETERMINATION** in the matter of **All Metals Processing Company, Docket #RCRA-09-2008-0034**, signed Steven L. Jawgiel, Regional Judicial Officer, was served on each of the parties at the address given below by mailing first class as here indicated:

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Dated at San Francisco, California, this 17th day of November, 2008

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA, Region 9